

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

DON THOMAS BUS COMPANY

and

Case No. 2-CA-36754

**LOCAL 713, INTERNATIONAL BROTHERHOOD
OF TRADE UNIONS – INTERNATIONAL UNION
OF JOURNEYMEN AND ALLIED TRADES**

*Simon-Jon H. Koike, Esq., for the General Counsel
Angelo R. Bisceglie, Jr., Esq., and
William Cusack, Esq., (Bisceglie &
Friedman, LLC), of Newark, New Jersey,
for the Respondent*

DECISION

Statement of the Case

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in New York, New York on October 26, 27 and 31 and November 2, 2005. The Complaint alleges that Respondent engaged in a number of violations of Section 8 (a) (1) of the Act and discharged Rosalba Orozco, Ivette Guadalupe and Alphonso McMillian and refused to pay wages to McMillian in violation of Section 8 (a) (3) of the Act. Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the parties on January 13, 2006, I make the following¹

Findings of Fact

I. Jurisdiction

Respondent, a domestic corporation with an office and place of business located at 86 Beechwood Avenue, New Rochelle, New York, is engaged in the business of transporting children to school.² Annually Respondent derives gross revenues in excess of \$250,000 and purchases and receives goods valued in excess of \$5,000 directly from suppliers located outside the State of New York. Respondent admits, and I find, that it is an employer engaged in

¹ The record is hereby corrected so that at page 394, lines 20 and 21, the last phrase is “for mid-day work.” General Counsel’s unopposed motion to correct page 395 to reflect the amendment of paragraph 13(a) of the complaint and to correct the transcript generally to substitute “Judge MacDonald” for “Hearing Officer Shapiro” is hereby granted.

² In March 2005 Respondent moved its operation to 1095 Close Avenue, Bronx, New York.

commerce within the meaning of Section 2 (2), (6) and (7) of the Act and that Local 713, International Brotherhood of Trade Unions – International Union of Journeymen and Allied Trades, is a labor organization within the meaning of Section 2 (5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

At the time of the events material to the instant case Respondent operated out of a facility consisting of a parking lot for buses and cars and a building with a repair shop downstairs and offices upstairs. It employed approximately 100 drivers and escorts, also known as matrons. Managers and supervisors communicated with employees while they were on the buses by means of a radio system. The drivers obtained their buses from the facility in New Rochelle, but the schools relevant to the instant proceeding are in the Bronx. It was usual for the drivers to pick up their escorts at a pre-arranged location after leaving the garage and before picking up the children.

Respondent's payday was Friday. On Friday morning when drivers came to the facility to prepare their buses for the days' work each driver would be given his or her paycheck and the paycheck for the escort who worked on the bus.

Liz Gamba, the owner of Respondent, testified that if an employee were guilty of some violation, company policy dictated that he would be spoken to and the situation worked out. If the same type of behavior occurred again, a written warning would be completed and "usually" a copy given to the employee. Supervisor Leroy Lloyd testified that Respondent's disciplinary policy is to give two verbal warnings to an employee, and then to progress to written warnings place in the employee's file. If an employee accumulates three or more written warnings that are serious in nature the employee may be discharged.

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B. Status of Alleged Supervisors and Agents

Respondent's owner Liz Gamba is the person who runs the company. She sets company policy and determines pay rates for employees. Gamba testified that Leroy Lloyd is a supervisor who has the authority to discipline employees and to hire and fire employees. Lloyd himself testified that he is "the Company Supervisor." Gamba and Lloyd are supervisors and agents of Respondent within the meaning of Section 2 (11) and (13) of the Act.

Blanca Rodriguez is the dispatcher and transportation coordinator of Respondent.³ Gamba testified that Rodriguez deals with employees concerning problems with their routes and problems with the school and parents. The record contains many instances where Rodriguez transmitted instructions to employees on behalf of Respondent. Gamba stated that Rodriguez has the authority to discipline employees and to issue written warnings to employees. Rodriguez herself identified many written warnings that she had signed. In addition, Rodriguez testified about her methods of interviewing applicants for employment and evaluating their qualifications. Rodriguez stated that Gamba hired employees based on recommendations from herself and Lloyd.

Miguel Agrispin, a former employee of Respondent, testified that in December 2004 he telephoned the company in response to a newspaper advertisement seeking school bus

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³ Rodriguez is bilingual in English and Spanish.

drivers.⁴ Agrispin spoke to Rodriguez who informed him of the job requirements. Agrispin went to Respondent's facility where he filled out an application and was given a road test by Leroy Lloyd. Later, Rodriguez informed Agrispin that he was hired. Agrispin did not meet with Gamba before he was hired.

I find that Rodriguez is a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act.

Preston Smalls was Respondent's site supervisor at the Kennedy School.⁵ Apparently, he is no longer employed by Respondent. Gamba testified that Smalls' duties included making sure the drivers got their buses to the school on time, ensuring that the buses were parked properly at the school to discharge and receive passengers, communicating with drivers whose buses were late to determine their whereabouts, acting as liaison between Respondent and the school, passing orders from Gamba to employees and transmitting information from company management to the drivers. Gamba testified that Smalls was a supervisor who had the authority to discipline workers and issue warnings, but he could not discharge employees.⁶ Drivers had to ask Smalls' permission before taking a restroom or coffee break. Lloyd testified that it was a violation of company policy for an employee to take a break without the authorization of the site supervisor at the school.

The testimony of Gamba establishes that at the time material to the instant case, Smalls was a supervisor with the authority to discipline workers and issue warnings. The testimony of Lloyd shows that Smalls had to approve employees' requests for restroom or meal breaks. Smalls was the only supervisor at the Kennedy School and he was responsible for overseeing all of Respondent's employees while they were at the school. The testimony of Gamba establishes that Smalls' duties included transmitting orders and information from management to the employees. I find that Smalls is a supervisor and agent of Respondent within the meaning of Section 2 (11) and (13) of the Act. Even had I not found that Smalls was a supervisor, the facts establish that Smalls acted as a conduit for orders and information from Gamba to the employees and was an agent of Respondent while exercising his duties. *Mid-South Drywall*, 339 NLRB 480 (2003), *Flying Foods*, 345 NLRB No. 10 (2005). It is clear that the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-7 (1987).

⁴ Agrispin worked for Respondent from January 3 to February 23, 2005. When Agrispin received a better job offer, he gave notice and then resigned his employment. I observed that Agrispin testified in a cooperative manner without holding back information that would be helpful to either party. Agrispin testified that he was not sympathetic to Local 713. There is a union at his present place of employment but he has not joined that union. Agrispin freely admitted when he did not recall certain things exactly. I find that Agrispin was an unbiased and truthful witness and I shall credit Agrispin's testimony without reservation.

⁵ Respondent's buses transport children to the Kennedy School.

⁶ In response to a question posed by Counsel for the General Counsel whether Smalls had the "authority to discipline people" Gamba answered "yes." I do not credit her later answer in response to questions by Counsel for Respondent that Smalls did not have the authority to issue discipline. I note that Gamba did not explain why she had first testified to the contrary.

C. Ivette Guadalupe

Facts

Ivette Guadalupe began working for Respondent on January 3, 2005 as a matron-escort.⁷ Her duties included escorting children on and off the school bus and attending to their needs while in transit on the bus. Guadalupe was the escort on a bus driven by Agrispin to the Kennedy School. On her first day of work Guadalupe met Agrispin while arranging to be picked up by Agrispin after he drove the bus down from New Rochelle to the Bronx. When Guadalupe gave Agrispin her address the two realized that they lived in the same Bronx apartment building. Guadalupe had not socialized with Agrispin and his wife, although she knew his wife by sight. Guadalupe and Agrispin no longer reside at the same location. There is no record evidence that Guadalupe and Agrispin had any relationship other than being friendly while performing their duties for Respondent.

Dispatcher Rodriguez testified that she spoke to Guadalupe on the telephone on the Friday before the Martin Luther King holiday.⁸ Guadalupe was upset that her paycheck was for an incorrect amount and she wanted to speak to Gamba. Rodriguez testified that Guadalupe was “rambling” about her paycheck and that she had a “ghetto attitude.” When Rodriguez informed Guadalupe that there would be a meeting on Monday to straighten out the checks, Guadalupe expressed surprise that she had to come to work on a day off. Rodriguez stated that she did not like Guadalupe’s tone of voice when she said she would attend the meeting. She said, “Don’t worry. I’m going to be there. ... You’re going to fix this problem.” Rodriguez documented the Friday phone call on a sheet entitled “Employee Warning Report.” Rodriguez wrote that Guadalupe “was loud and rude and kept on repeating that her check was wrong and that it had to be fixed that day.” The document states the date of warning as January 14, 2005. There is no evidence that this warning was ever shown to Guadalupe. Gamba also filled out an Employee Warning Report dated January 14 which stated that Guadalupe called and was “disrespecting” Rodriguez. The document states that Gamba spoke to Guadalupe on this day. Gamba offered no testimony that she spoke to Guadalupe about the January 14 phone conversation with Rodriguez. There is no evidence that this warning was ever shown to Guadalupe.

Gamba testified that “most of the time” warnings are prepared on the day that they are dated. The person who writes a warning may come back to the file and add extra writing to it at a later time, according to Gamba. Although the managers and supervisors who filled out the

⁷ I shall credit Guadalupe’s testimony. Many of her statements were supported by documentary evidence and by the testimony of Agrispin, an unbiased and truthful witness. Further, much of her testimony was uncontradicted. Guadalupe showed a good recall of dates and events. She was a cooperative witness on cross-examination by Counsel for Respondent. Her demeanor was calm and forthright and she impressed me as a witness who listened to the questions and sought to give accurate answers.

⁸ Rodriguez gave testimony that was obviously slanted to favor Respondent. Her bias was apparent as she denigrated the employees’ efforts to obtain the pay to which they were entitled. Rodriguez exaggerated in her description of certain events and was inaccurate as to other events. This will be evident in the instant decision as I discuss all of the testimony and documentary evidence. I find that various documents and the testimony of reliable witnesses show that Rodriguez gave inaccurate testimony to bolster Respondent’s case. I shall not credit Rodriguez.

warning forms in evidence generally placed a date on the form, the spaces for employee signatures and dates are uniformly blank. It is apparent to me from my close reading of the record and inspection of the various warning forms that at good proportion of them were filled out quite some time after the events they describe and that material was added over time.

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Although General Counsel subpoenaed employee warning forms for the time prior to the events at issue herein, Respondent did not produce those. Thus, the record does not show that Respondent had a practice of issuing discipline to employees for the type of conduct engaged in by Guadalupe or the other alleged discriminates herein. When asked about her failure to respond properly to General Counsel's subpoena, Gamba at first testified, "I didn't know I was supposed to go through old files." Then Gamba recalled that there was a flood at the New Rochelle location which caused her to lose files. She said the flood occurred before 2005 or maybe in 2003 or 2004, or maybe before that. Gamba also mentioned a raccoon infestation. I do not credit any of this testimony about a flood and the files. It is evident that Gamba's first remark was the most accurate: she did not go through the old files in response to General Counsel's subpoena.⁹ As a result, I may fairly conclude that the written warnings in Respondent's files would not have supported Respondent's position herein.

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Guadalupe testified that she was never shown any written warnings while she was employed by Respondent and no supervisor ever told her that she was being given a verbal warning.

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Schools were closed on Monday, January 17, 2005 for the Martin Luther King Day holiday. Respondent called employees to a meeting at its facility to discuss problems with the paychecks. Gamba explained to the employees that Respondent had recently switched to a new payroll company and that most of the paychecks distributed to employees on the previous Friday were incorrect. In fact, most employees were not paid all the money owed to them. Gamba stated that the problems would be corrected and that employees would be given their money. The meeting room at Respondent's facility was not large enough to accommodate all the drivers and escorts at one time so Respondent asked employees to wait outside in their buses: indeed, employees were issued cleaning supplies and were told to clean their buses. The evidence indicates that employees were not paid for their time on January 17.

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Guadalupe described the January 17 Martin Luther King holiday meeting at the facility. Gamba conducted the meeting. Rodriguez, Lloyd and Smalls were present along with the drivers and escorts. Gamba apologized for the incorrect paychecks. She mentioned that the checks of those employees who performed mid-day runs did not include payment for those runs and she promised to fix the paychecks.¹⁰ Guadalupe testified that she did not speak up at this meeting.

Both Rodriguez and Gamba testified that Guadalupe spoke up at the January 17

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⁹ I do not find that Gamba was a credible witness. Much of her testimony was contradicted by documentary evidence and by the testimony of more reliable witnesses. Gamba injected a lot of hearsay into her testimony, all of which I have disregarded. Gamba was confused as to the timing of various events and many of the facts she testified to were unsupported by the necessary documentary evidence. Gamba gave inconsistent and shifting testimony as to many material facts herein. I shall not credit Gamba's testimony.

¹⁰ A mid-day run takes place later than the pick up for children who are delivered to school at 9 am. The mid-day run begins at around 10 am and the children are brought to school by noon.

meeting. Rodriguez testified that she was present as employees came into the meeting and that she could hear employees speaking amongst themselves. Rodriguez said that she observed Guadalupe and that "she would be classified as an instigator." Before the meeting began Rodriguez heard Guadalupe making "negative" statements to others whose checks did not correctly reflect all the hours they had worked. Guadalupe also said, "What do they think they are? They think they are going to pay us this?"¹¹ Rodriguez recalled that all the employees at the meeting were upset. She said that at the end of the meeting Guadalupe came up to Gamba and that her head wobbled back and forth and her arms were up in the air as she told Gamba that she had to fix the paychecks. Rodriguez could not recall how Guadalupe was terminated, but she cited Guadalupe's "attitude."

Gamba also testified about the January 17 meeting. She stated that employees were upset and frustrated. Gamba testified that Guadalupe was loud, argumentative and disrespectful. She used body language such as using her hands and rolling her eyes, saying "you're going to fix my check, you better give me my money." Gamba said Guadalupe put her finger close to her face. Guadalupe said she did not understand why there were problems with the paychecks and she kept saying if she did not get her money there would be a problem. Gamba said that Guadalupe accused the company of treating employees like "slaves" and saying that the company would not get away with this. Gamba testified that she wrote an Employee Warning Report which stated that Guadalupe "went crazy at the meeting. She was yelling and being disrespectful and loud. ... This employee will not listen to reason and she will be spoken to." The document is dated January 17. There is no evidence that it was ever given to Guadalupe or that she was ever given an oral warning concerning the meeting.

Guadalupe testified that during the week following January 17 she saw organizers for Local 713 in front of the Kennedy School. The Union agents were approaching school buses and handing out flyers. Site supervisor Smalls told the drivers not to speak to the Union agents because they were no good. Smalls told the bus drivers to roll up their windows. One day Smalls got on to the bus with Agrispin and Guadalupe. He told them not to talk to the Union, saying that the Union only wants their money. Smalls said that there are only two good Unions, Local 1199 and Local 100. Guadalupe replied that she had been a nurse's aide for three years and had belonged to Local 1199. She told Smalls that Local 1199 is a good union but it does not represent workers on buses. When Guadalupe went home for her lunch break she telephoned Local 713 and requested information. That evening Union agent Jordan El Haq telephoned Guadalupe at home. At the Kennedy school on Thursday January 20 several Union agents, including Haq, were present to speak to the drivers and escorts whose buses were parked near the school. Smalls placed himself in front of Haq and yelled, "You get out of here. I'm going to call the cops." Smalls instructed Respondent's drivers to close their windows and not to talk to the Union agents. Smalls then entered Guadalupe's bus and observed her filling out an authorization card for Local 713. Smalls asked Guadalupe what she was doing. When Guadalupe replied that she was filling out a union card, Smalls said that Gamba "will fire you for that." Smalls told Guadalupe that if she ripped up the card he would not tell Gamba that she had signed. So Guadalupe ripped up the card. After Smalls got off the bus Guadalupe asked Agrispin for his blank card and she filled it out and later gave it to the Union.¹² Guadalupe's card, dated January 20, 2005, is in evidence.

¹¹ Rodriguez said she was not in the room during the meeting but she could see and hear from the dispatch room where she was located at the time.

¹² Respondent did not call Smalls to testify herein and did not state that he was unavailable to testify.

Agrispin recalled that a few days after the Local 713 organizers began appearing at the Kennedy School dispatcher Rodriguez made an announcement on the radio that employees should not speak to the Union agents. Agrispin stated that Smalls told the drivers to roll their windows up and not to speak to the Union. Agrispin was sure this had nothing to do with the outside temperature: Small did not want employees speaking to the Union. One day after
5 Guadalupe had spoken to the Local 713 agents at the Kennedy School, Smalls approached Guadalupe and Agrispin and told them not to get into the Union. He said nobody knows them, they just want money and they are extortionists. He suggested that the employees join Local 1199. Guadalupe replied that it was a hospital union. Agrispin was approached by Union
10 organizers outside the facility after he parked his car before work in the morning. He also saw the Union agents outside the facility in the afternoon. Agrispin testified that the Union never blocked his bus as it was entering the facility. One day Agrispin saw the police outside the facility speaking to the Union agents and Gamba. As he left work and walked to his car the same day a Union agent stood and spoke to him outside the facility. Gamba came over and
15 told the Union agent to leave Agrispin alone. Then she told Agrispin not to talk to the Union and that "they were extorting her."

Gamba testified that she learned of the Local 713 organizing effort on January 18, the first day that Union agents appeared outside the facility and outside the Kennedy School.
20 Gamba saw the organizers outside the facility at 6 am. They introduced themselves to Gamba and asked her to speak to them.

On Friday January 21, 2005 Agrispin informed Guadalupe that he did not have their paychecks and that they had to report to the facility for a meeting and to pick up their checks.
25 Guadalupe went upstairs to the office for a meeting. Gamba, Lloyd, Smalls and Rodriguez were there as well as about 20 drivers and matrons. Gamba began by saying that she was sorry about the problems with the paychecks which did not include all the money owed to employees. Then, according to Guadalupe, Gamba said, "I better not catch anybody talking to the Union. The Union is no good. They just want your money. We had a union here before and if you want
30 I can bring them back." Gamba stated that if she had a list of those who signed for Local 713 she would fire them. Gamba continued, "This is my company. I have had this company for ten years. This is my family. I'm not going to let nobody destroy it. I'd rather shut it down than let a union in." A driver spoke up and said it sounded as though Gamba were threatening the employees. Gamba said she was not threatening but "I'm just begging you. This is my family."
35 Then Guadalupe spoke up. She said the majority of matrons wanted to hear about the Union because they felt that Gamba was paying them less than the minimum wage. Gamba replied that most matrons work 15 ½ hours per week. Guadalupe retorted that she herself worked 37 ½ hours per week. Guadalupe stated that she spoke loud enough to make herself heard. Gamba then ended the meeting and said she wanted to meet with the matrons and drivers in
40 pairs in order to give them their paychecks.

On cross-examination Guadalupe stated that she did not tell Gamba the escorts were being paid like slaves, but she did say that they felt they were getting less than the minimum wage. Guadalupe denied threatening Gamba and she denied using foul language. Although
45 Gamba had once accused Guadalupe of showing disrespect to Gamba's mother in a telephone conversation about her check, Guadalupe told Gamba that she did not do that.

Agrispin recalled the January 21 meeting. He stated that Gamba began by saying that the employees should not speak to the Local 713 representatives: they just want money and they are extortionists. Gamba said she would rather give money to the employees. She stated
50 that she had built the company and if employees gave her time it would get better. Gamba said the company was family to her and employees would be fired if they joined the Union. Agrispin

testified that Guadalupe spoke up and said she was getting less than the minimum wage. Gamba replied that Guadalupe was only working part-time hours. A driver named Chris said it sounded like Gamba was threatening them. Agrispin said that Guadalupe raised her voice at this meeting and "yelled". She was not happy about her paycheck but she was not disrespectful and she did not say she was being treated like a slave. She said they were being paid less than the minimum wage.

Guadalupe testified that as she and Agrispin waited to meet with Gamba to receive their checks, an office clerical employee named Raquel passed out a piece of paper saying that those who would not sign up with the Union should place their names on the paper.¹³ Raquel told Guadalupe to sign but Guadalupe refused, saying that she wanted her check and she wanted to hear what the Union had to offer. Eventually, Guadalupe and Agrispin met with Gamba in a room where Gamba's mother was also present.¹⁴ Gamba asked Agrispin to show her his name on the list of employees who promised not to sign for the Union. Agrispin showed Gamba that he had signed the paper and she gave him his paycheck. Gamba asked Guadalupe why she had not signed the paper. Guadalupe replied that she did not sign and that she wanted her check. Gamba asked her what the check had to do with the Union. Guadalupe asked whether she would be fired if she did not sign the paper and Gamba replied, "Yes, it's insubordination." Then Guadalupe signed the list and Gamba gave her a paycheck.

Agrispin testified that Gamba told the employees to sign a paper stating that they would not join the Union. A young woman handed out the paper. Agrispin signed but Guadalupe did not. Agrispin and Guadalupe went into a room where Gamba and her mother were present. Gamba asked whether Agrispin had signed and he showed her his signature on the paper. Then Gamba asked whether Guadalupe had signed and she said no. In the end Guadalupe signed the paper and she was given her paycheck.

Rodriguez did not testify about the January 21 meeting.

Gamba gave confused testimony about the events of January 21. Gamba identified an Employee Warning Report which she prepared. The document identifies the violation date as January 23, 2005, a Sunday. There is no date on the document to show when it was prepared. The text states: We had a company meeting regarding payroll. ... Once again Ivette became irate and disrespectful in the office. I explained we would correct everyone's check but she would not listen to reason and threatened me so I terminated her. This occurred over the telephone later on." However, in her oral testimony Gamba stated that there was no general meeting that day and that the incident happened in her office. On her initial testimony responding to questions by General Counsel pursuant to Section 611 (c) Gamba quoted Guadalupe as saying, "I ain't putting up with the fucking bullshit, who the fuck do you think you are." Gamba testified that she replied, "Then don't even come back here any more." Later, testifying in response to questions posed by Counsel for Respondent, Gamba stated that she fired Guadalupe over the telephone. The only reason for the discharge was insubordination. Gamba testified that she did not consider Guadalupe a troublemaker and never used that term. However, Gamba's affidavit refers to Guadalupe as a "troublemaker" and "argumentative."

In response to questions posed by Counsel for Respondent Gamba testified that she did not threaten to fire an employee for supporting Local 713, that she did not ask anyone to

¹³ Respondent did not identify Raquel on the record and did not call her to testify herein.

¹⁴ Gamba's mother, who apparently has some role in the company, was not further identified on the record and she was not called to testify herein.

threaten employees for supporting Local 713 and that she did not instruct Smalls to fire anyone who supported Local 713. Gamba testified that she did not monitor Union meetings and did not know which employees sympathized with Local 713. She stated that she did not threaten to withhold paychecks in retaliation for Union activity and she did not deliberately underpay employees for supporting Local 713. Gamba stated the above as general denials. However, it is significant that Gamba did not address any of the specific incidents testified to by General Counsel's witnesses. Gamba did not deny the actions and words attributed to her by the detailed testimony of General Counsel's witnesses. In view of the lengthy, extremely detailed and specific testimony of General Counsel's witnesses in the instant hearing, I do not find that Gamba's general denials were sufficient to counter the facts stated by General Counsel's witnesses.

Carolina Alvarez was called to testify by Respondent. Alvarez was an escort at the time of the relevant events. She is now a dispatcher. In response to a leading question whether she remembered a meeting on Martin Luther King Day, Alvarez described a meeting where Gamba explained that the paychecks were incorrect and said she would give a raise next month. According to Alvarez, Guadalupe was "mumbling in the back." When Gamba asked her what she was saying, Guadalupe said she was being paid less than the minimum wage. Guadalupe said people should not work for Gamba because of the pay she gave them. Alvarez stated that Guadalupe was yelling and screaming and said that they were being paid "like Mexicans." Alvarez quoted Guadalupe as saying that what Gamba promised the employees was "bullshit" and "if this company doesn't have a union, we wasn't going to go nowhere."¹⁵

Guadalupe testified that she worked on Monday January 24.¹⁶ On Tuesday January 25 Guadalupe had an asthma attack and experienced difficulty breathing. At 5 am Guadalupe telephoned Lloyd and told him that she was having an asthma attack. Lloyd said, "OK." A few seconds later Lloyd telephoned Guadalupe and asked whether he had just spoken to her. She said he had and that she had just telephoned to say she could not work that day. Again Lloyd said, "OK."¹⁷ That afternoon Guadalupe telephoned Gamba to say she would work the next day. The person who answered the telephone in Respondent's office said that Gamba was busy and Guadalupe left a message. Forty-five minutes later Guadalupe again telephoned the office to make sure that Gamba had received her message. When Gamba came on the phone Guadalupe said that she would come in tomorrow. Gamba said, "No, your place is already filled." Guadalupe asked what she meant. Gamba replied, "No, it's not working out. You're questioning my authority, you support the Union." Guadalupe asked what it meant that her place was filled and Gamba replied that Guadalupe was threatening her.

Agrispin testified that Guadalupe did not work one day. When Gamba informed him that he had a new matron that day she also said that Guadalupe had not called in. Agrispin telephoned Guadalupe and informed her that she had to call in if she wanted to work the next day. Guadalupe replied that she had called the office and had spoken to Frank and left a message for Gamba. Then Agrispin telephoned Gamba and informed her that he had spoken to Guadalupe and she was coming to work the next day. However, on the next day Guadalupe told Agrispin that she had been fired. She did not ask for Agrispin's help in the instant case.

Guadalupe worked a total of three weeks for Respondent. After she was terminated she

¹⁵ As will be seen below, I find that Alvarez did not have an accurate recollection of the events.

¹⁶ This testimony is uncontradicted by any payroll or other records.

¹⁷ Lloyd did not testify about his conversation with Guadalupe.

5 filed an unpaid wage claim with the New York State Department of Labor. Eventually she received a check for \$72 from the company. Guadalupe had been underpaid \$24 per week by Respondent. The Department of Labor told Guadalupe that she had been paid at the rate of \$4.17 per hour. This calculation was made taking into account a supplemental check Gamba had given Guadalupe before her termination to make up for mistakes made by the payroll company.

10 After she was discharged Guadalupe went to work for Local 713 trying to organize Respondent's employees. Guadalupe stood on the street in front of the facility. Sometimes she stood in the street near the gates to the facility. Guadalupe said that she never stood in front of a bus to block its progress on the road. She never saw Union agents trying to block a bus in this manner. Some drivers would stop their buses and speak to Guadalupe. She would ask them if they wanted to sign a Union card. About one week after she began working for the Union driver Alphonso McMillian stopped his bus as he was entering the facility. McMillian asked Guadalupe how she was doing and what was going on. As she stood there speaking to McMillian a man came out of Respondent's shop and told McMillian to go on and keep driving and not to speak to Guadalupe. Then Gamba came out to the gate and told Guadalupe, "You bitch, get out of here." Two days later Gamba called Guadalupe on the telephone and said, "If I ever catch you around my fucking buses again watch what's going to happen." Guadalupe also accompanied Local 713 agents to the schools served by Respondent in an effort to organize the employees. Guadalupe said that she and the other organizers never spoke to drivers while there were children on the buses. They arrived at the schools at 9 am and left at around 10:30 when the buses left the school. She never observed any school officials complaining about the organizing activity.

25 Guadalupe denied that she ever stepped into a bus to speak to a driver after she was fired, although she stated that she did stand in front of the bus door.

30 Gamba testified that before Local 713 began organizing the employees she did not stand outside the company premises to observe what was going on. After the Union came around she stood outside waiting for the drivers to bring the buses back following their afternoon runs. Gamba said she also sat outside in her parked car to observe the organizers.

35 Guadalupe testified that both the drivers and matrons are given lists of parents and children on their buses. After she was fired, Guadalupe called the parents on her list and identified herself and she asked whether she could speak to them. If the parents did not want to speak to her she ended the phone call. If the parents were willing to speak to her she made appointments to see them. When she met with the parents Guadalupe told them that the Respondent did not provide any benefits to its employees and did not pay them the correct amounts. Guadalupe explained that the employees needed the Union to protect the drivers and matrons and enable them to do their jobs correctly. A parent called Guadalupe and told her that a matron on her child's bus looked like a crack-head and that another matron had dragged a child off a bus. Guadalupe told the parent that the company was hiring matrons "from everywhere".

45 Lloyd testified that the only thing he recalled about Guadalupe was that she constantly arrived late for work and that he warned her about this. Respondent introduced no documents to support this allegation and no other company witness charged Guadalupe with lateness. It is evident that Lloyd has confused Guadalupe with another, unnamed, employee. Further, Guadalupe was a matron and thus she did not report for work at the facility in New Rochelle; instead, she was picked up by her driver in the morning before the bus proceeded to the children's homes. Lloyd's statement shows that he testified about Guadalupe without

remembering anything about her. This willingness to testify about an employee to her detriment in a manner not based on actual recall of the facts shows that Lloyd did not understand the need to testify truthfully and to base his testimony on events of which he had a clear recollection.

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Discussion and Conclusions

I begin with a discussion of the written employee warnings. First, the record shows that none of these warnings was ever shown to the employee concerned. Second, Gamba admitted that warnings were not necessarily written on the day that a supposed infraction occurred and that additional matter might be added to a written warning. Thus, the warnings have little or no probative weight. Finally, Respondent did not produce warnings for prior years that were subpoenaed by General Counsel. I assume that these would not have supported Respondent's position herein. Respondent produced five written warnings for employees dated after Guadalupe's termination. They purport to show that warnings were issued for being late, for leaving the scene of an accident and for failing to call in for a week. There is no indication in the record that these warnings were given to the employees concerned.

The two written warnings dated February 14 were never shown to Guadalupe. They document Guadalupe's telephone conversation with Rodriguez concerning the insufficient paycheck given to Guadalupe that day. The warnings fault Guadalupe for being loud and rude and demanding her correct pay. Neither Rodriguez nor Gamba testified that they ever orally disciplined or warned Guadalupe for this conversation. No one from Respondent ever told Guadalupe that her manner of proceeding on February 14 was a subject of concern to the company. Indeed, there is no positive evidence on the record as to when these documents were prepared. For aught that appears on the record they may have been written when Respondent decided to terminate Guadalupe or even later.

Guadalupe testified credibly that she did not speak up at the employee meeting held on January 17. Instead, both Guadalupe and Agrispin testified credibly that Guadalupe spoke up at the January 21 meeting. Thus, I do not credit Gamba and Rodriguez that Guadalupe spoke at length at the January 17 meeting. Rodriguez testified that before the meeting started she heard Guadalupe talking with other employees about their incorrect paychecks. Rodriguez characterized her as "an instigator." This testimony makes it clear that Rodriguez faulted Guadalupe for discussing wages with other employees, an activity which is protected by the Act. Rodriguez also testified that after the meeting Guadalupe animatedly told Gamba that she had to fix the paychecks. I note that both Rodriguez and Gamba testified that all the employees at the January 17 meeting were upset and frustrated. I do not give any weight to the written warning dated January 17 in which Gamba wrote that Guadalupe went crazy and was disrespectful and loud. First, I find that Guadalupe spoke up at the January 21 meeting. Second, Respondent never showed Guadalupe the writing dated January 17. Neither Gamba nor Rodriguez testified that they ever warned Guadalupe after the January 17 meeting. If Guadalupe's conduct had in fact been considered egregious Respondent could not have failed to speak to her about it and warn her. The fact that the warning cites "crazy" behavior but that Respondent did not remonstrate with Guadalupe leads me to the conclusion that the warning was written long after January 17.

I credit Guadalupe that after January 17 the Local 713 organizers appeared at the Kennedy School. I credit Guadalupe's uncontradicted testimony that supervisor Smalls told employees not to speak to the Union agents and that Smalls told the organizers to leave or he would call the police. I credit Guadalupe's testimony, uncontradicted by the testimony of any witness who was present at the scene, that the Union did not approach buses to speak to

employees while children were on the bus. I credit Agrispin's uncontradicted testimony that Smalls told him not to speak to the Union agents and not to join the Union and that Rodriguez made a radio announcement that employees should not speak to Union agents.¹⁸ I credit Guadalupe's uncontradicted testimony that Smalls told her to tear up the Union authorization card and that Smalls said Gamba would fire her for filling out a card. I credit Agrispin's testimony that one day Gamba saw him speaking to a Union agent outside the facility after work and that she told him not to speak to the Union. Gamba did not specifically deny this incident which Agrispin described in abundant detail.¹⁹

I have found that Smalls is a supervisor and that, even if he is not a supervisor, he is an agent of Respondent for the purpose of communicating orders and information from Gamba to the employees. Smalls is the highest ranking employee of Respondent at the school site. Therefore I find that Respondent violated Section 8 (a) (1) of the Act when Smalls instructed employees not to speak to the Union agents and not to join the Union.²⁰ I find that Respondent violated Section 8 (a) (1) of the Act when Smalls instructed Guadalupe to tear up her authorization card and threatened that Gamba would fire Guadalupe for filling out a card. *Alaska Ship and Drydock*, 340 NLRB 874, 878 (2003). I find that Respondent violated Section 8 (a) (1) of the Act when Rodriguez announced over the radio that employees should not speak to the Union agents and when Gamba approached Agrispin after work while he was with the Union organizers off company property and instructed him not to speak to the Union. *North Hills Office Services*, 344 NLRB No. 134, slip op. at 1 (2005).

I credit Guadalupe and Agrispin's uncontradicted testimony that at the January 21 meeting Gamba told the employees not to speak to the Local 713 agents. This instruction violated Section 8 (a) (1) of the Act. I credit Guadalupe's uncontradicted testimony that Gamba told employees that she would rather shut down the company than let the Union in. This threat of plant closure violated Section 8 (a) (1) of the Act. I credit Guadalupe and Agrispin that at this meeting Guadalupe complained that the escorts were being paid less than the minimum wage and that she told Gamba that was why they wanted to hear about the Union. I credit Guadalupe and Agrispin that Gamba stated that she would fire an employee for joining the Union. This threat violated Section 8 (a) (1) of the Act. I credit Guadalupe and Agrispin that although Guadalupe raised her voice and yelled when she complained about the paychecks and about receiving less than the minimum wage, she was not disrespectful.

I credit Agrispin's uncontradicted testimony that on January 21 Gamba instructed the

¹⁸ Rodriguez did not deny making this announcement. Rodriguez gave hearsay testimony that the Union approached the buses and disturbed the children, but she admitted that she never saw this happen and that she did not receive any complaints about the organizers.

¹⁹ I note that Gamba testified that the Kennedy School had complained that drivers were speaking to Union organizers and that the children were scared. She also said that the School had called the police. Gamba did not identify any school official who contacted her. Because I find Gamba generally unreliable and because she did not witness any of the events, because she offered no dates or documents to support her testimony and because she did not offer any police reports, I do not credit her testimony. I contrast Gamba's lack of specificity as to dates and other details concerning purported school complaints with her recitation of the exact route numbers of the three buses whose drivers spoke to the Local 713 organizers in front of the Kennedy School.

²⁰ Respondent introduced no evidence that it maintained a uniformly enforced and non-discriminatory rule prohibiting all talking or solicitation during working time. See *E.L.C. Electric*, 344 NLRB No. 144, slip op. at 16 (2005).

employees to sign a paper promising that they would not join the Union. I credit Guadalupe and Agrispin's uncontradicted testimony that an office clerical employee named Raquel passed out a paper for the signatures of those who would not join the Union. Requiring the employees to announce whether or not they supported the Union amounted to an unlawful interrogation and constituted a violation of Section 8 (a) (1) of the Act. *Viracon, Inc.*, 256 NLRB 245, 252 ((1981). I credit Guadalupe and Agrispin's uncontradicted testimony that when they met with Gamba and her mother in the office Gamba asked them both to show her where they had signed the list circulated by Raquel. I credit Guadalupe's uncontradicted testimony that Gamba told her that she would be fired for insubordination if she did not sign the list. I credit Guadalupe and Agrispin's uncontradicted testimony that Gamba did not give Guadalupe her paycheck until she signed the list. I note that despite very detailed testimony about this meeting by Guadalupe and Agrispin, Gamba did not offer any denials as to the specific occurrences described by the witnesses. The threat to discharge employees and withhold their pay unless they promised not to join the Union was a violation of Section 8 (a) (1) of the Act.

I do not credit Gamba's testimony about Guadalupe's conduct on January 21. First, Gamba denied that there was a general meeting on January 21 even though the written warning which Gamba dated January 23 stated that there was a company meeting regarding payroll. The purported warning of January 23 states that Guadalupe was "irate and disrespectful" and "threatened", but did not mention the gross obscenities that Gamba testified to. As is evident from my recitation of Gamba's testimony about January 21 and 23, her testimony was inconsistent and confused. I rely on the testimony of Guadalupe and Agrispin that Guadalupe was not disrespectful and I do not find that Guadalupe used the words that Gamba attributed to her.²¹ I do not credit any of Respondent's witnesses that Guadalupe used excessive body language or behaved in a physically threatening manner.

I note that although Alvarez placed Guadalupe's comments in an employee meeting on Martin Luther King Day, January 17, 2005, she nevertheless quoted Guadalupe as making statements in support of the Union. The Union began organizing only after that day and I do not credit Alvarez' recollection that the events she described took place on January 17. Rather, I find that Alvarez was testifying about a discussion that took place on January 21. (Gamba testified that the Union first began organizing on January 18 and the record shows that Guadalupe signed her authorization card on January 20.) Although Alvarez recalled that Guadalupe used the word "bullshit" she did not attribute to Guadalupe the more extreme language that Gamba testified to. At the time she testified Alvarez had been promoted to dispatcher and she was hardly a disinterested witness. She had obviously been prepared to testify about January 17 in an inaccurate manner. Finally, it is clear that Guadalupe was stating her conviction that employees were being paid less than the minimum wage, that they should not work for Gamba at that rate of pay and that they would go nowhere without a union. This analysis of Alvarez' testimony is not in contradiction to the testimony of Guadalupe and Agrispin.

I credit Guadalupe's uncontradicted testimony that she worked on January 24 and called in sick on January 25. I credit Agrispin's uncontradicted testimony that he spoke to Guadalupe who told him she had left messages about being sick and returning to work. I credit Agrispin's uncontradicted testimony that he told Gamba that Guadalupe would work on January 26. I

²¹ Moreover, Guadalupe testified that after she was fired and was organizing for the Union in front of the facility, Gamba called her a bitch and told her to leave the area. Guadalupe also testified that Gamba telephoned her and used a gross obscenity to her. Gamba did not deny either of these two incidents. It seems likely that the offensive terms were a product of Gamba's mind rather than of Guadalupe's mouth.

credit Guadalupe's testimony that when she spoke to Gamba on January 25 to confirm her earlier message that she would work the next day, Gamba told her that her place was filled and that "it's not working out. You're questioning my authority, you support the Union."

I do not credit Gamba that she fired Guadalupe for "insubordination" related to any improper conduct by Guadalupe. In reality, Guadalupe's insubordination consisted of joining and supporting the Union. Respondent violated Section 8 (a) (3) of the Act when it discharged Guadalupe.

As discussed above, I find that Respondent's explanations at trial for Guadalupe's discharge were pretexts. I have credited Guadalupe that Gamba told her that she was fired for questioning Gamba's authority and supporting the Union. Moreover, Respondent has not shown that it would have discharged Guadalupe in the absence of her membership in and support for Local 713. See *Wright Line*, 251 NLRB 1083 (1980). The warning notices discussed above are suspect. There is no satisfactory proof as to when and how they were prepared and it is certain that they were never shown to Guadalupe. Respondent failed to produce other warnings subpoenaed by General Counsel, leading me to conclude that they would not have supported the company's position herein. Moreover, as discussed above, I do not believe the testimony that Guadalupe engaged in inappropriate or overly physical acts at any employee meeting. I find that the testimony was exaggerated to reflect badly on Guadalupe. In this connection I note that Gamba did not deny making the obscenity-laced telephone call to Guadalupe after the latter joined the Union organizers outside the facility.

Finally, I attach no significance to the fact that, as part of her organizing activities on behalf of Local 713 after she was discharged, Guadalupe contacted parents of children on her route. First, there is no evidence that any parent complained about being contacted. Second, there is no evidence that Guadalupe should not have possessed a list of parents on the route for which she had been responsible for during her employment. Respondent did not show that it had requested return of the list or that it had notified employees that they may not contact parents on the list. Third, Guadalupe did not lose the protection of the Act when, after a parent complained to her about the behavior of certain escorts, Guadalupe replied that Respondent was hiring escorts "from everywhere." Guadalupe had indicated to the parents that her call was related to an ongoing labor dispute and her reply to the parent was not the type of "flagrantly disloyal, reckless or maliciously untrue" statement that has been found to exceed the bounds of comment concerning an employer. *Mountain Shadows Gold Resort*, 330 NLRB 1238, 1240 (2000). Indeed, the statement that escorts were being hired "from everywhere" is a rather mild reply to the parent's much more serious allegation that one escort looked like a crack-head and another had physically abused a child.

D. Alphonso McMillian

Facts

Alphonso McMillian began driving a company school bus on January 3, 2005. He was discharged on February 17. McMillian drove children to both the Kennedy School and the Life Skills School in the Bronx. He picked up the children in the Bronx and Queens.²²

McMillian testified that during the week of the Martin Luther King holiday he saw Union

²² I find that McMillian was a truthful and reliable witness. He displayed a calm and cooperative demeanor while testifying and did not seek to evade questions posed by Counsel for Respondent.

organizers outside the facility and at the Kennedy School. On Friday after the holiday he received his check in Respondent's office. McMillian was asked to sign a paper stating that he would not join the Union. McMillian signed the list and then he was given his check.

5 McMillian recalled that during the week of January 24 Gamba and Smalls met with all the drivers and escorts on the sidewalk in front of the Kennedy School. Gamba said that a union was coming to represent the employees and that it was a good union as opposed to the union that the employees had seen previously. Gamba then handed out applications for membership in Local 124, International Union of Journeymen & Allied Trades.²³ Gamba said
10 that if the employees filled out the application forms she would work on getting them medical benefits. McMillian filled out an application and gave it to Gamba. On Friday, February 4, 2005 Gamba held an employee meeting in the office. She introduced James Baritone, an organizer for Local 124. Gamba said that Local 124 was a good union and that the employees should join. Agrispin also testified that he attended a meeting at the Kennedy School in February
15 where Gamba talked about a new union that was better than Local 713. Gamba spoke about the benefits of Local 124 and said that, in contrast to Local 713, Local 124 was not extorting her.

McMillian testified that after Guadalupe was fired and one week before he was fired he saw Guadalupe in front of the facility as he was returning his bus for the day. McMillian stopped
20 his bus and spoke to Guadalupe. McMillian said that Guadalupe did not get on his bus on this occasion. A company mechanic named "Carlo" was nearby using his walkie-talkie. Carlo told Guadalupe to get away from the bus and then he told McMillian to go see Gamba. McMillian recalled that when he saw Gamba in the office she was angry. Gamba said, "Why are you talking to those people? ... I told you they were bad people and I told you what they did to my
25 brother. ... They're bad people. And if I see you talking to them again, I'm going to fire you and hold your paycheck."

Carlos Ayala, the mechanic in charge of Respondent's facility, testified that he recalled a Hispanic lady who was a former employee of the company and who joined the organizers for
30 the Union. Ayala stated that he watched the gate of the facility and he watched the organizing to see what went on. Ayala said he would tell the buses to move on when the organizers were there. Later on he would tell Gamba which bus had stopped to talk to the Union organizers. Ayala also told Lloyd when buses stopped to speak to the Union.

35 Frank Gamba, was a dispatcher for Respondent during the time period relevant to the instant case.²⁴ Frank Gamba testified that he saw Guadalupe outside the facility at the top of the steps of a company bus speaking to McMillian. Frank Gamba told McMillian he could not stop and let anyone on the bus. Guadalupe descended the stairs and left and McMillian drove his bus inside.
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McMillian testified that on February 17 he worked as usual. After McMillian parked his bus in the facility at the end of the day Lloyd told him that Gamba was firing him. McMillian asked why but Lloyd could not explain. The two men walked to Gamba's office and Lloyd went in to see Gamba. Then Lloyd came out and told McMillian, "She said you're fired. I don't know
45 why." McMillian asked for a letter of termination and for his final paycheck but he was told that Gamba did not give those letters and that his pay would be mailed to him. McMillian never received a paycheck for his last week of work. McMillian was also owed money for some mid-

50 ²³ Gamba testified that she signed a collective-bargaining agreement with Local 124 in January or February of 2005. She could not recall the date.

²⁴ Frank Gamba is the brother of owner Liz Gamba

day runs. McMillian complained to the Department of Labor and the investigation is still open.²⁵

McMillian testified that while he was working for Respondent he was looking for other jobs and he used the company as a reference. He did not tell any supervisors that he was seeking other employment.

On cross-examination by Counsel for Respondent McMillian testified that he began work at 6 am for his morning run. He picked up two children in Queens and the rest of his passengers in the Bronx. He sometimes had a mid-day run when he picked up children at 10 or 11 am. If he had a mid-day run then he would wait at the school for the children to emerge. Often he would be told to go to the school at the end of his run and stand by in case a child was sick and had to be taken home. Sometimes McMillian was instructed to go back to the facility between runs.

McMillian denied that he was ever missing with his bus after he dropped the children off at school or at home. He said that the company radios did not always work. He acknowledged that it was possible management informed him that they had been unsuccessful in reaching him. McMillian testified that Lloyd might have informed him once or twice that he was out of communication. He never told Lloyd that he was not reachable because he was taking care of a personal matter. McMillian denied telling Rodriguez that he was leaving Respondent for another job and that he needed time off to be fingerprinted. McMillian stated that he did not leave Respondent's employ to take another job. He found a job a week or so after he was fired by the company.

Liz Gamba identified an Employee Warning Report dated January 13, 2004 and signed by Lloyd. It states, "Alfonzo did not bring his bus back to the base. When I tried to talk to him about this he walked away from me." There is no testimony on the record to show when this was written by Lloyd and no evidence that it was ever shown to McMillian.

Liz Gamba identified an Employee Warning Report which she dated January 18, 2005 stating that McMillian had not completed his file of required governmental documents. The narrative continues that McMillian said he did not complete the paper work because he was looking for another job and ends with an assertion that McMillian was told he would be terminated if his paperwork was not in order. Rodriguez also wrote an undated narrative of this occasion. These documents were apparently not shown to McMillian.

McMillian testified that he had updated his file with respect to some required governmental documents but that he did not complete the task due to time and money constraints.

Rodriguez testified concerning the company's practices with respect to employees who had not turned in all the required New York State Department of Transportation documents. Rodriguez said that a lot of employees did not have the required papers and documents in their files. According to Rodriguez, Gamba was lenient and gave employees an additional two to three weeks to complete their files.

Gamba identified a Warning Report she wrote and dated February 15. The document states that McMillian was "missing with the bus again. When he arrived late he was told to

²⁵ Respondent claims to have sent McMillian a check for his final week's pay, but the record shows that the check was never cashed.

leave. He flipped out and had a temper tantrum in the office. I calmed him down and we talked and he was supposed to come back in the morning and never showed. I called and left several messages at home and cell and he never returned the call.” With respect to this incident Gamba testified that after McMillian finished his run he did not answer the radio or the cell
 5 phone and he later explained that he had personal business to take care of. McMillian also told Gamba that he was unhappy with his pay rate and did not plan on staying long with the company. Gamba testified that she pointed out to McMillian that he had just started and she convinced him to give the job a chance. Rodriguez also wrote a Warning Report dated February 15 stating that she had no contact with McMillian for two hours and he arrived at the
 10 base after 5 pm. There is no evidence that either of these documents was ever shown to McMillian.

At first, Liz Gamba testified that McMillian was both fired and he quit. She stated that she forgot which happened first. Then Gamba said McMillian had quit but later agreed to give
 15 the job more time and was subsequently fired for taking the bus after being warned by Lloyd.

Rodriguez’ testimony generally paralleled that of Gamba. However, Rodriguez’ testimony was confused as to when certain incidents occurred. She said she herself talked to McMillian and told him to give the job another chance after he gave one week’s notice following
 20 a discussion with Gamba about pay problems. Rodriguez said he promised to give Gamba an opportunity to “work this out” and he would speak to her the next Monday. But on Monday, according to Rodriguez, McMillian disappeared with the bus. I note that February 15, 2005 was a Tuesday and February 17 was a Thursday. Rodriguez testified that she did not know whether McMillian quit or was fired.

Lloyd testified that McMillian was warned three or four times about being out of contact with the dispatcher and returning late to the facility. On one such day McMillian was late returning to the facility in the afternoon and Lloyd had to try for 1 ½ hours before he could reach McMillian on the radio. Lloyd testified that McMillian was fired for these infractions. He did not
 30 dispute McMillian’s detailed testimony concerning the conversation in which he informed McMillian of his termination. Lloyd did not deny that he told McMillian that he did not know the reason for McMillian’s termination. Lloyd did not deny going with McMillian to Gamba’s office after McMillian requested an explanation of the discharge. Lloyd did not deny that he emerged from Gamba’s office to say, “She said you’re fired. I don’t know why.”

Discussion and Conclusions

The testimony of Respondent’s witnesses was so confused, self-contradictory and inconsistent with the documentary evidence that it is impossible to reconcile the testimony and
 40 documents with any version of how McMillian stopped working at the company. It is evident from the warning notices that Respondent contends that McMillian was missing with his bus on January 13 and February 15. There is no evidence that any of the warning notices were shown to McMillian and he denied ever being reprimanded by anyone for such an infraction. As to the February 15 incident, Gamba gave detailed testimony that she calmed McMillian down after this
 45 incident and he agreed to give the job another chance. Gamba apparently would have me believe both that McMillian did not come to work after this incident and that he was fired for it. There is some suggestion in the testimony of Rodriguez that McMillian was fired for a subsequent incident which was not described by Gamba. It strains credulity, given the plethora of warning notices produced herein, that no subsequently dated warning notice was created.
 50 Rodriguez’ testimony is just as incredible as Gamba’s and requires no further discussion.

Significantly, McMillian testified that he was informed by Lloyd on February 17 that

Gamba was firing him but that Lloyd could offer no explanation. Although Lloyd testified, he did not deny McMillian's version of the discharge and McMillian's testimony about the events of February 17 stands uncontradicted on the record. Thus, I find it impossible to credit Lloyd's testimony that McMillian was fired for being out of communication with the dispatcher and returning late with his bus. If this had been the reason for the discharge, then Lloyd would surely have so informed McMillian especially since Lloyd testified that he repeatedly remonstrated with McMillian concerning his faults.²⁶

Respondent's post-hearing brief contains "proposed findings of fact" which state that after February 15, 2005, "McMillian left Respondent and, despite several attempts to contact Mr. McMillian, he never communicated with the Respondent or appeared for work again." Thus, despite Lloyd's testimony that McMillian was discharged, Respondent apparently contends that McMillian quit. Later in its brief, Respondent also contends that McMillian was fired for being out of communication, for taking company property and for failing to obtain DOT documents. Respondent apparently has not decided whether to argue that McMillian quit or was discharged, and Respondent's witnesses apparently could not decide which way to testify. These inconsistencies further bolster my conclusion that the testimony of Respondent's witnesses was incredible and cannot be relied upon. I note that not a single witness testified that Lloyd was discharged for failing to complete his DOT documents and I shall not discuss this allegation further.

I credit McMillian's uncontradicted testimony that on the Friday after Martin Luther King Day he was asked to sign a paper stating that he would not join the Union before he was given his paycheck. I have found above that this action by Respondent violated Section 8 (a) (1) of the Act.

I credit McMillian's uncontradicted testimony that during the week of January 24 Gamba told employees that that they should join Local 124, that she handed out applications for membership in Local 124 and that she said she would get medical benefits for employees if they joined Local 124. This unlawful promise of benefits violated Section 8 (a) (1) of the Act.

I credit McMillian's uncontradicted testimony that one week before he was fired Gamba berated him for speaking to Guadalupe, told him that the Local 713 people were bad people and said that if she saw McMillian speaking to them again she would fire him and hold his paycheck. This threat violated Section 8 (a) (1) of the Act.

I credit McMillian that Lloyd told him on February 17 that Gamba was firing him and gave him no reason for the discharge.

I have found above that Lloyd, Gamba and Rodriguez are not credible witnesses and I do not rely on any of their testimony concerning McMillian.

The record is clear that Gamba expressed her hostility to Local 713 and told employees not to speak to its representatives but instead to join Local 124. Gamba extracted promises from employees that they would not join Local 713 and she berated employees for speaking to its organizers. The record is clear that Gamba expressed great hostility to Guadalupe after she was fired and began organizing for Local 713. Gamba called Guadalupe a bitch and told her to stay away from her buses and Gamba made a threatening and obscene call to Guadalupe about her organizing activities. After Ayala told Gamba that McMillian was speaking to

²⁶ I note that I have found above that Lloyd is an unreliable witness.

Guadalupe, Gamba threatened to fire McMillian. Respondent's anti-union animus is thus well established in the record.

I am convinced that McMillian was fired as a result of anti-union animus. Lloyd, who told McMillian he was fired, would give him no reason for the action. Gamba's stated explanation is shifting, inconsistent and not credible. I find that Respondent's proffered explanation for the discharge is a pretext. The discharge, coming so soon after Gamba's threat to fire McMillian for speaking to the Union organizers, leads to the unavoidable conclusion that McMillian was fired because Respondent knew that he was speaking to organizers for Local 713 and to discourage him from joining Local 713. Respondent thus violated Section 8 (a) (3) of the Act.

E. Rosalba Orozco

Facts

Rosalba Orozco was hired by Respondent as a bus driver in December 2004. Orozco testified herein in English. Because Respondent has made an issue of Orozco's ability to speak English, I paid particular attention to her ability to speak English while she was testifying. I observed that Orozco speaks and understands English well. She speaks with a heavy Spanish accent. I had no trouble understanding Orozco's testimony. However, Counsel for Respondent, in accord with Respondent's position in the instant case, repeatedly asked what Orozco had said after she finished giving an answer on the record. I was able to repeat to Counsel what Orozco had just said on these occasions. During her testimony Orozco was asked to read aloud a paragraph written in English and she accomplished this readily.²⁷

Because Respondent offered testimony about Orozco's purported inability to communicate with parents, schools and others, it is appropriate to discuss what I observed concerning her level of proficiency with the English language. Although an ALJ would not normally engage in subjective discussions based on personal observations dehors the record, Respondent's own arguments have made this necessary in order to convey in writing what I observed as Orozco testified. Orozco speaks English as well as many service personnel employed in New York City, including public transit bus drivers, waiters and sales clerks. Furthermore, New York is *de facto* a bilingual city. Signs in buses and subways are all posted in English and Spanish. Politicians of both major political parties attempt to employ the Spanish language when they speak in public in New York City. New Yorkers are quite used to listening to and understanding even heavily accented English. I judged that Orozco's English would be well-understood by the average New Yorker.

A further comment is necessary to this discussion. The printed volume of the instant record in which Orozco's testimony is transcribed is replete with errors and is of a much lower quality than the rest of the record. The volume omits many words spoken by Counsel and the witnesses.

Orozco testified that she obtained her job after she telephoned Respondent in response to a newspaper ad seeking bus drivers. Orozco spoke to Rodriguez who made an appointment for her to take a road test with Lloyd. Orozco stated that she spoke English to Rodriguez on this

²⁷ I find that Orozco was a credible and reliable witness. She was cooperative on cross-examination and did not attempt to shade her testimony. Orozco readily admitted that certain issues brought up by Respondent had been discussed with her. She displayed an open and guileless demeanor while being questioned by Counsel for Respondent.

occasion because Rodriguez instructed her to speak only English. After she was hired, Orozco attended a meeting conducted by Rodriguez and Lloyd at which drivers were informed of their duties and were instructed to check the condition of the children boarding the school bus. Orozco also accompanied a more experienced driver on his route to observe how he dealt with the children and the parents. It was company policy for a new driver to go out on a route to see how the experienced driver greeted the parents and asked about the condition of the children. On Orozco's first day of work another driver accompanied her to show her the route.

Rodriguez testified that she conducts the preliminary interview for drivers and matrons and tells them that they must be able to communicate sufficiently well in English.²⁸ Rodriguez stated, "I tried to keep the interview as much as possible in English even though often they would ask questions in Spanish." If the prospective employees asked questions in Spanish, "I would answer their questions, but I would always let them know that I had to conduct the interview in English and that it was important for them to answer as much as possible in English because it was an important factor in their hiring." Rodriguez answered questions about job conditions and wages in Spanish because the employees were unsure and "we all speak Spanish." But she told them that when it comes to the work it had to be done in English. Rodriguez acknowledged that it was not a problem giving explanations in Spanish.

Lloyd, who gave Orozco her driving test, stated that at the initial interview with a prospective employee the supervisor speaks English and will see how it goes. According to Lloyd, this interview is the test of English competency given by the Respondent. Lloyd then testified that a person who is not able to communicate satisfactorily in English at the interview might still be hired if the office staff was able to communicate with him and if he were able to speak some English.

Orozco was assigned to drive an afternoon route to the Life Skills School. In addition, she filled in for morning shift drivers who were absent from work.

Orozco testified that there were seven or eight children on her regular route. Five of these children had Spanish speaking parents.

Orozco testified that when she communicated with Rodriguez by means of the radio, she was instructed to speak English. If Orozco spoke in Spanish, Rodriguez would correct her. No one else ever spoke to Orozco about her use of language. Orozco stated that Rodriguez never told her that her English was not good enough. No one at the school ever complained to Orozco about her English skills. On cross-examination by Counsel for Respondent, Orozco denied that she used her cell phone to communicate with the company and denied that she was ever instructed to do so. Orozco denied that she ever called Rodriguez to ask her what a child or a parent was saying. Orozco called Rodriguez when a child was late coming to the bus stop because the company policy was that she should wait not more than five minutes.

Orozco saw Union organizers outside the facility on two occasions during the week of the Martin Luther King holiday. The first time Orozco saw them the Union agents introduced themselves to the employees who were present. The second time the Union organizers asked the employees to sign an authorization card. Orozco's car was parked outside the company facility. Orozco and some other employees spoke to the Union in Orozco's car and Orozco signed a card on January 20, 2005.

²⁸ More than one half of Respondent's employees speak Spanish as a first language.

Orozco worked her afternoon run on Friday January 21. Before she left the facility to pick up the children a woman wearing a company uniform asked Orozco whether she had signed a card for the Union. Orozco replied, "Why do you want to know. If I did, so what?" There was a meeting that afternoon but it did not begin until after Orozco left to do her run.

5 While Orozco was performing her bus route Rodriguez informed her by radio that Gamba wished to see her that afternoon. After bringing her bus back to the facility, Orozco waited for Gamba to appear. At 5 pm Rodriguez told Orozco to leave but to call in Monday before reporting for work. On Monday morning Orozco called and Lloyd told her not to report to work because her school was closed due to snow.²⁹ Later that day Rodriguez telephoned Orozco and told her, "Liz said we don't need you anymore." When Orozco asked for a reason
10 Rodriguez replied that she did not know. Rodriguez added that she had spoken to Lloyd that morning but he did not tell her anything and that Liz was the boss. Orozco denied that she ever told Rodriguez, Gamba or Lloyd that she did not want to work for the company. Orozco said that she did not quit her employment with Respondent.

15 Orozco testified that she had only spoken to Gamba twice while she worked for the company. On the first occasion, Gamba asked Orozco to fill in as a matron and on the second occasion Orozco asked Gamba for an additional route. Gamba replied that Orozco would have to wait because there were not enough routes. Orozco asked Gamba about her paycheck: she
20 had been promised \$300 per week but she was only receiving \$130. Gamba explained that even though Orozco came in every morning at 6 am as a standby, she was actually driving only one afternoon route.

25 Gamba testified that New York State Department of Transportation regulations require school bus drivers to "speak and understand the English language sufficiently well enough to communicate with passengers." Gamba said that she could not speak to Orozco because her English was poor. Rodriguez communicated with Orozco in Spanish. Indeed, according to Gamba, Rodriguez spoke Spanish to all the company employees who could not understand English. Gamba further stated that she would not normally fire someone who could not
30 communicate well in English. She said, "It's hard for me to fire the employees here."

Gamba testified that she received complaints from the school that they were uncomfortable with the fact that they could not communicate with Orozco and that Orozco's bus arrived late. Gamba did not provide any specifics or documentation about these complaints.
35 The record shows that Respondent has a site supervisor at each school who records the arrival time of each school bus. Respondent did not offer the supervisor's records to show that Orozco had a problem of arriving late at school. The written logs would have been the best evidence of Orozco's arrival times. Respondent did not call the site supervisor to support its contention that Orozco was consistently late and that the school complained. Gamba's testimony about
40 Orozco's late arrivals is unsupported hearsay.

Orozco denied being shown an Employee Warning Report signed by Gamba about a driver refresher course.³⁰ She denied being shown a report dated January 11 signed by Lloyd. This document states, "I am having communication problem with Rosialba. I asked her twice
45 already if she knows all the location of the addresses on her route. ... She states, yes. However her bus is 20 minutes late for arrival at the school, 'Second day now.' She cannot explain why."

²⁹ Not all schools were closed that day. Apparently, the afternoon session at Life Skills was cancelled.

50 ³⁰ The document is dated January 18, 2005. There is no evidence that it was ever shown to Orozco.

Lloyd testified that he believed Orozco did not know her route because, “she never made it to the school on time.” Lloyd did not testify about the warning report he signed. He did not state when it was written and he did not state that he showed it to Orozco. He did not explain why the warning notice said that Orozco was late twice but in his testimony he said she was “never” on time. Lloyd did not testify that Orozco was terminated for any infraction or failing.

Rodriguez testified that Orozco did not express herself clearly on the radio and so they spoke on the cell phone to clear up the details. According to Rodriguez Orozco asked for clarification of instructions issued by Lloyd and once she told Rodriguez that she did not understand a parent. Rodriguez provided no details as to this incident except to state that she told Orozco that she did not have to speak perfect English but must do the best she can. Rodriguez testified that as part of her job she logs the arrival time of each vehicle at each school. She said that many times Orozco was late by 10 to 20 to 30 minutes. Respondent did not offer these logs into evidence. Clearly, they would have been the best evidence to prove that Orozco was indeed late. Rodriguez identified a Warning Weport signed by her and dated January 19. The report states, “School calls that on daily basis route is late 15 to 30 minutes.” The report lists the violation date as January 12 through 19. Rodriguez did not testify that she showed the warning to Orozco nor did she say when she wrote the document.

Orozco testified that her bus arrived late at the school on two occasions. Once there was very heavy rain and the other time was due to bad traffic conditions. She was never warned that these occasions were unacceptably frequent. On cross-examination Orozco stated that Lloyd never reprimanded her for arriving late at school or for being lost on her route. She saw Lloyd every day and he never mentioned these subjects. Orozco denied that she was ever lost on her route: she knew her route.

Gamba testified that Orozco was not discharged for any of the problems cited in the testimony of Respondent’s witnesses. According to Gamba, Orozco quit her job by telling Rodriguez that she was not coming in any more when Rodriguez called her after a snow storm. However, Gamba acknowledged that her sworn affidavit states that Orozco was terminated by Respondent because she did not speak English well enough and was a bad driver.

Rodriguez testified that on a Monday after a snow storm she informed Orozco that she was not needed because her afternoon route was cancelled.³¹ Rodriguez stated that she called Orozco on Tuesday and Orozco said she was not coming to work because she had been told to stay home. Rodriguez maintained that no one fired Orozco: she did not come to work that Tuesday and she never came back to work.

Discussion and Conclusions

Respondent’s defense to the allegation that Orozco was terminated because she joined and supported Local 713 is both puzzling and revealing. Respondent offered documents and testimony regarding Orozco’s purported failings. As discussed above there is no evidence that any of the written warnings were written on the date indicated on the document and it is certain that none of them was shown to Orozco. Respondent failed to introduce any time logs or reports of complaints from the school to support its allegations that Orozco was always late and that she could not communicate with the school. I have found above that Gamba, Rodriguez and Lloyd are not credible witnesses and I do not credit them in this instance. Moreover, Orozco credibly denied that she was “never on time” as alleged by Lloyd, she credibly denied

³¹ This day was Monday, January 24, 2005.

that she experienced language problems while on duty and she credibly denied that she did not know her route. Thus, I find no reliable evidence that Respondent discharged or would have discharged Orozco for problems on the job.

5 I note that Respondent's witnesses established that it was common to speak Spanish to employees and that employees with imperfect English were hired and retained by Respondent.

10 Despite the litany of problems that Respondent's witnesses attributed to Orozco both Gamba and Rodriguez testified that Orozco had not been terminated. This testimony was given months after Gamba's sworn affidavit that Orozco had indeed been discharged. At the hearing, both Gamba and Rodriguez denied that Orozco was fired and they said she refused to return to work after having been called to do so following a snow day. Respondent's post-hearing Brief states that, "On January 25, 2005, Ms. Orozco contacted Respondent to inform Respondent that she would not be returning to work again."³² Startlingly, Respondent's Brief also argues
15 that Orozco was discharged, "because she was in violation of department of transportation regulations requiring her to sufficiently communicate in English."³³

20 It is well established that shifting and mutually inconsistent defenses are a hallmark of an attempt to conceal the fact that an employee has been discharged in violation of the Act. Respondent's testimony and arguments relating to Orozco must surely constitute the epitome of shifting and mutually inconsistent defenses. *Airport Distributors*, 280 NLRB 1144 (1986); *Poly-America*, 328 NLRB 667, 668-9 (1999).

25 I credit Orozco that on January 25 Rodriguez told her that Liz Gamba did not need her services any longer.

Orozco signed a card for Local 713 on January 20 while sitting in her car with other employees at the facility. The evidence establishes that Carlos Ayala observed the Union agents and reported to Liz Gamba about the Union's activities around the facility. Gamba also
30 watched the public area around the facility and, as shown above, she confronted at least one employee who talked to the Union agents. Orozco's testimony establishes that on January 21 she was asked by an unidentified employee whether she had signed a card for the Union and she did not deny that she had done so. Orozco was discharged on January 25, just days after she signed the card and days after Liz Gamba's unlawful comments about the Union on
35 January 21. This was the same day that Liz Gamba discharged Guadalupe, telling her that she was questioning Gamba's authority and supporting the Union.

The Board has stated the applicable law as follows:

40 It is well established that where there is no direct evidence, knowledge of an employee's union activities may be proven by circumstantial evidence from which a reasonable inference may be drawn. Such circumstances may include the employer's demonstrated knowledge of general union activity, the employer's demonstrated union animus, the timing of the discharge in relation to the employee's protected activities, and the
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³² This appears in the section entitled "Proposed Findings of Fact."

³³ Contrary to the assertion in Respondent's Brief that the ALJ could not understand Orozco, the record shows that Counsel for Respondent repeatedly stated that he could not understand Orozco and the ALJ then repeated Orozco's testimony. The only exception to this occurred
50 when Counsel for Respondent asked Orozco to repeat a phrase in Spanish or when Orozco testified in too low a voice. See transcript at 349, 351, 357, 358, 359, 371, 377.

pretextual reasons for the discharge asserted by the employer. *Kajima Engineering and Construction*, 331 NLRB 1604 (2000). (Citations omitted)

Respondent's anti-union animus has been established by the evidence discussed above. Although there is no direct evidence that Gamba knew about Orozco's membership in the Union, the timing of Orozco's discharge soon after she joined the Union, Respondent's unlawful threats and acts with respect to the Union, Respondent's shifting defenses and its inability to explain why Orozco ceased to be employed lead me to conclude that Orozco was discharged because she joined and supported Local 713. I find that Respondent's assertions concerning Orozco's purported failings on the job are false and were offered as pretexts. There is simply no credible evidence that Respondent discharged Orozco for any reason other than her support of Local 713. Respondent has not shown that it discharged Orozco for any legitimate reason or that, in the absence of Orozco's support for the Union, it would have discharged her for a legitimate reason. Orozco's English was good enough for Lloyd when he gave her a driving test and good enough for Rodriguez when she interviewed Orozco. Both of these witnesses testified that they evaluated an applicant's English skills. Respondent has not shown by credible evidence that Orozco was unjustifiably or consistently late arriving at the school and it has not provided reliable evidence that the schools complained about Orozco. Respondent thus violated Section 8 (a) (3) of the Act by discharging Orozco.

Conclusions of Law

1. By instructing employees not to speak to Local 713 and not to join the Union Respondent violated Section 8 (a) (1) of the Act.

2. By ordering employees to tear up their signed Local 713 authorization cards Respondent violated Section 8 (a) (1) of the Act.

3. By coercively interrogating employees and instructing employees to sign a document promising not to join Local 713 and by threatening to withhold the pay of employees and discharge employees who did not sign the document Respondent violated Section 8 (a) (1) of the Act.

4. By threatening employees that they would be discharged for joining Local 713 Respondent violated Section 8 (a) (1) of the Act.

5. By threatening employees that if they spoke to agents of Local 713 the company would discharge them and hold their paychecks Respondent violated Section 8 (a) (1) of the Act.

6. By threatening employees that Respondent would close the company rather than let in Local 713 Respondent violated Section 8 (a) (1) of the Act.

7. By discharging Ivette Guadalupe and Rosalba Orozco because they joined and supported Local 713 Respondent violated Section 8 (a) (3) of the Act.

8. By discharging Alphonso McMillian and withholding a portion of the pay due to him because he spoke to agents of Local 713 and to discourage him from joining Local 713 Respondent violated Section 8 (a) (3) of the Act.

9. By promising employees medical benefits if they joined Local 124, R.A.I.S.E., IUJAT, AFL-CIO, Respondent violated Section 8 (a) (1) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, Respondent must make Alphonso McMillian whole for the wages it withheld at the time of his discharge, plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁴

ORDER

The Respondent, Don Thomas Bus Company, Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Instructing employees not to speak to Local 713 or any other union and instructing employees not to join Local 713 or any other union.

(b) Ordering employees to tear up signed authorization cards for Local 713 or any other union.

(c) Coercively interrogating employees and instructing employees to sign a document promising not to join Local 713 or any other union and threatening to withhold the pay of employees and discharge employees for failing to sign such a document.

(d) Threatening to discharge employees if they join Local 713 or any other union.

(e) Threatening to discharge employees and withhold their pay if they speak to agents of Local 713 or any other union.

(f) Threatening to close the company if the employees select Local 713 or any other union to represent them.

(g) Discharging or otherwise discriminating against any employee for supporting Local 713 or any other union.

³⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(h) Promising employees benefits if they join Local 124 or any other union.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Ivette Guadalupe, Alphonso McMillian and Rosialba Orozco full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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(b) Make Ivette Guadalupe, Alphonso McMillian and Rosialba Orozco whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

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(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(e) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked "Appendix"³⁵ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 2005.

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³⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated, Washington, D.C., March 28, 2006.

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Eleanor MacDonald
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 713, International Brotherhood of Trade Unions – International Union of Journeymen and Allied Trades, or any other union.

WE WILL NOT threaten to discharge you for joining Local 713 or any other union.

WE WILL NOT threaten to discharge you and hold your paycheck if you speak to Local 713 or any other union.

WE WILL NOT coercively question you about your union support or activities and WE WILL NOT ask you to sign a document promising not to join Local 713 or any other union.

WE WILL NOT withhold your pay unless you sign a document promising not to join Local 713 or any other union.

WE WILL NOT instruct you not to speak to Local 713 or any other union.

WE WILL NOT order you to tear up signed authorization cards for Local 713 or any other union.

WE WILL NOT threaten to close the company if you select Local 713 or any other union as your collective-bargaining representative.

WE WILL NOT promise you medical benefits if you join Local 124 R.A.I.S.E., IUJAT, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Ivette Guadalupe, Alphonso McMillian and Rosialba Orozco full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ivette Guadalupe, Alphonso McMillian and Rosialba Orozco whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, including the amount we withheld from McMillian when he was unlawfully discharged.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Ivette Guadalupe, Alphonso McMillian and Rosialba Orozco, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

Don Thomas Bus Company

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.